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January 18, 2007

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Re: In re William Lyon Homes Shareholder Litigation
C.A. No. 2015-N; Consolidated
Date Submitted: January 9, 2007

Dear Counsel:

Intervenor Alaska Electrical Pension Fund has moved, under Court of Chancery Rule 59, for reconsideration of, or for a new trial following, the Court's denial of its request for an award of attorneys' fees and expenses.[1] Alaska raises three contentions: (1) that its attorneys, California Counsel, should be credited with a "causal connection" between their efforts and the settlement approved in the Delaware Action; (2) that an evidentiary hearing should have been held to allow Alaska to develop the record to support its claim for attorneys' fees and expenses; and (3) that the Court should specify that its decision is "without prejudice to Alaska's right to file a separate application" in the California Action.

* * *

A party moving for reargument bears the burden of demonstrating that the Court misunderstood a material fact or misapplied the law.[2] To obtain a new trial, the disappointed party must show that manifest injustice otherwise would result.[3] To the extent that Alaska may be seeking to ask the Court to modify its judgment, even though no judgment has been entered, it is Alaska's obligation to demonstrate

[1] *In re William Lyon Homes S'holder Litig.*, 2006 WL 3860916 (Del. Ch. Dec. 21, 2006). The terms defined there will also be used here.
[2] *In re ML/Eq Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000).
[3] *See, e.g.*, *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *2 (Del. Ch. May 11, 2001).

"(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice."[4]

* * *

This action involved a challenge to a tender for the publicly-held, minority shares of the Company. The tender consideration increased from $93 per share to $109 per share in two discrete steps. The first, from $93 per share to $100 per share, resulted from the initial agreement negotiated by Delaware Counsel to settle the Delaware Action. Alaska chose not to participate in that settlement and has not demonstrated that its acts (or the acts of California Counsel) aided that settlement. When the Defendants and Delaware Counsel reached their initial understanding, Alaska was asked to join in the settlement. Alaska now argues that the mere fact that it was asked to join in the settlement demonstrates that it must have contributed to (or caused to some extent) the agreement. When defendants settle a dispute that is being litigated in more than one forum, they obviously want to resolve it on a comprehensive basis. That a plaintiff in another forum is invited to

[4] *Nash v. Schock*, 1998 WL 474161, at *1 (Del. Ch. July 23, 1998).

participate in the settlement proves nothing with respect to whether that plaintiff's efforts had any causal connection to the settlement.

After Delaware Counsel had agreed to settle for $100 per share, a third party investor with a sizable holding of stock in the Company balked and approached the Defendants directly. With its economic power, it was able to achieve something that none of the lawyers could achieve: an additional increase of $9 per share. Alaska concedes that its counsel did not directly cause that increase;[5] it intimates that its counsel indirectly caused the increase, perhaps by keeping the litigation ongoing in California. That, however, is a contention for which there is no factual basis. The third-party investor, with or without the continuing litigation in California, would have achieved the increase, and the settlement before this Court would have been revised accordingly.

Alaska and California Counsel are not being penalized, as they suggest, for failing to participate in the initial settlement of the Delaware Action.[6] In order to be awarded a fee, California Counsel are required to show a "causal connection." They have not demonstrated that their efforts contributed either to the initial

[5] Alaska's Mot. at ¶ 2.
[6] Their suggestion that Delaware Counsel did not achieve the maximum benefit possible for the shareholder class may be fair criticism of the fee award itself. It does not, however, demonstrate that California Counsel should be compensated.

settlement (from $93 to $100 per share) or to the final increase (from $100 to $109 per share). Without a causal connection between their efforts and either of the increases in share price (or any of the other benefits achieved through the settlement of the Delaware Action), they are left with nothing more than having undertaken a parallel action in a different forum. As *Infinity Broadcasting* teaches, the "mere pendency" of litigation that involves the same claims in another jurisdiction is not sufficient to satisfy the burden, held in this instance by California Counsel,[7] to show that "their efforts elsewhere conferred a benefit realized as part of the Delaware settlement."[8]

* * *

Alaska next argues that it did not have "a fair opportunity to develop and present the evidence which the Court's decision has required."[9]

At the hearing to consider both approval of the settlement and award of attorneys' fees and expenses, the Court specifically raised with counsel for Alaska the question of whether an evidentiary hearing should be held. Counsel, however,

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[7] *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 293 (Del. 2002).
[8] *Id.* at 291.
[9] Alaska Mot. at ¶ 3. If Alaska is suggesting that the need for an evidentiary hearing could not be foreseen because the Court applied other than settled law, that suggestion is rejected because no new law is at work here.

did not accept the Court's invitation; he merely responded that Alaska would be "amenable" to such a hearing.[10] When a judge asks whether an evidentiary hearing is necessary and counsel to whom the question is asked does not respond that a hearing is necessary (or requested), the party represented by that counsel cannot later come forward, after receiving a decision with which it is not satisfied, and express its second thoughts. The opportunity to seek a hearing was extended; Alaska could have taken advantage of the opportunity, but it did not. The Court properly went forward to decide the fee application based on the record as it was.[11]

* * *

Alaska asks that the Court state that its decision is without prejudice to Alaska's rights to pursue a fee application in the related California Action. The Court declines Alaska's invitation. The Court determined the questions presented

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[10] The colloquy, in part, was as follows:

> The Court: I'm—this is a—a question to the committee as a whole, but you're [Counsel for Alaska] at the podium. Is this something that really requires an evidentiary hearing? I don't imagine anybody really likes the affirmative answer to that, but put yourself in my position. How am I supposed to go about resolving it [the question of whether California Counsel conferred a benefit reflected in the settlement] otherwise?
>
> [Counsel for Alaska]: Well, I do think you have affidavits to support that. I actually would be amenable to an evidentiary hearing, but I do believe . . .

Settlement Hr'g Tr. (Aug. 9, 2006) at 69-70.

[11] It should also be noted that Alaska never sought to take discovery and never asked for an evidentiary hearing.

to it. Specifically, it concluded that Alaska could not establish a causal connection between the efforts of its lawyers and the settlement of the Delaware Action; therefore, it is not entitled to an award of fees by this Court. There is no reason to qualify that decision.[12]

* * *

For the foregoing reasons, Alaska has not met its burdens under Court of Chancery Rule 59; therefore, its motion for reconsideration or for a new trial is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

[12] Defendant General William Lyon, in his opposition to Alaska's motion, may be asking—it is not entirely clear—that the Court determine whether its judgment should be given *res judicata* (or, perhaps, collateral estoppel) effect by the courts of California if Alaska should resume its quest for a fee award in that venue. The *res judicata* (or collateral estoppel) effect, however, of a court's judgment is not to be determined in advance by the court in which the judgment is entered. *In re Nat'l Auto Credit, Inc. S'holders Litig.*, 2004 WL 1859825, at *3 (Del. Ch. Aug. 3, 2004).